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International Court of Justice

H1263 - 0002

THE BREACH OF PEACE BETWEEN STATES AND ITS CULPABILITY

PLEA

before the

INTERNATIONAL MILITARY TRIBUNAL IN NURNBERG

in the trial

of Hermann Goering et al

by

Dr. Hermann Jahrreiss

Professor of Law

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with appendices, containing official statements, extracts from scientific works and two indices of authors and works

1946

H1263-0003

Mr, President

May it please the Tribunal,

The main juridical and fundamental question of this trial concerns war, which is forbidden by International Law, the breach of peace as treason to the world constitution.

It overshadows all other juridical questions.

The four chief prosecutors discussed this problem in their opening speeches, sometimes as the central problem of their presentation, sometimes as a fundamental problem and indeed not without looking at it from different perspectives.

Counsel for the defence has to examine it now. From among the defence counsel, I have been asked to conduct this examination. It is true that it remains for every counsel to decide if and to what extent he feels himself in a position, as a result of my arguments, to renounce his own presentation of the question of the breach of the peace. But I have reason to believe that this possibility will be used to such an extent that the intention of the counsel for the defence, considerably to simplify technically that part of the trial which is now beginning, will be realized by my speech.

I have to deal here only with the juridical question and

H1263 - 0004

not with the evaluation of the hearing of evidence which has lasted for months. And I am also dealing only with the question of such law as is at present valid, not with the question of such law as could or should be demanded in the name of ethics or of human progress.

I have a purely scientific task to fulfil. Science wants nothing but the truth, knowing full well that its goal can never be completely attained and that its path is therefore without end.

I wish to thank the Secretary General of the Tribunal for having placed at my disposal the documents of a decisive nature and very important literature. Without this chivalrous assistance, it would not have been possible, under the present conditions in Germany, to complete my work. The literature accessible to me was published predominantly in the United States. Knowing the vast French and English technical literature on this subject which I have studied during the last quarter of a century - I am unfortunately not conversant with the Russian language - I believe, however, that I can fairly say that no important idea is overlooked, because in no other country of the world has the discussion of our problem, which has become the great problem of humanity, been more comprehensive and more fundamental than in the United States.

It was this fact that enabled me to forego the use of the scientific literature published in the former German sphere of control. In this way even the semblance of a pro domo line of argumentation will be avoided.

Because of the short time at my disposal for this speech

H1263 - 0005

and, at the same time, owing to the abundance and difficulty of the problems with which I have to deal, it is not possible to read here the documents and quotations which I am using. I shall present only a few sentences. Any other procedure would interrupt the line of argumentation for the listener. I therefore submit to the Tribunal the documents and references to books in appendices to my juridical arguments. In this way, what I say can be quickly verified today, tomorrow and thereafter.

The Charter threatens individuals with punishments for breach of the peace between states.

And it appears that the Tribunal accepts the Charter as the unquestionable basis for all juridical considerations.

This means that the Tribunal does not examine the question whether the Charter is, as a whole or in parts, open to juridical objections a question which nevertheless remains open.

If this is so:

Why then make any statements at all here on the great fundamental legal questions?

The British Chief Prosecutor even made it the central theme of his great address

H1263 - 0006

to examine the relationship of the Charter, where our question is concerned, to the international public law at present valid. He justified the necessity of his arguments as follows: It is the task of this Tribunal to serve humanity, and this task could only be fulfilled by the trial if the Charter was consistent with International Law, that is, if the punishment of individuals for breach of the peace between states was founded in the International Law at present valid.

It is, indeed, necessary to clarify whether certain stipulations of the Charter may have created new laws and consequently laws with retroactive force.

Such a clarification is not carried out here in order to save historical research students work. They will examine this, just as they will all the other findings in this trial, according to the rules of free science, perhaps through many years of work and certainly without limiting the ground covered by the questions and, if possible, on the basis of an incomparably greater quantity of documents and evidence.

Such a clarification is indispensable, simply for the reason that the decision as to right and wrong depends, or may depend, upon it, particularly if the Charter is considered legally unassailable.

Let us assume that it were thus: The Charter does not formulate criminal law which is already valid, but

H1263 - 0007

creates new and therefore retroactive criminal law. What does this signify for the verdict? Must this not be important for the question of guilt?

Perhaps the retroactive law which, for instance, penalises aggressive war was not already fixed in the conscience of humanity at the time when the act was committed, nor was the ground even simply prepared for it there. Then the defendant cannot be guilty in the sense that he was aware of the wrongfulness of his behaviour, not before himself nor before others.

Or the retroactive law was perhaps promulgated at a time when a new conscience was just beginning to take shape but was still not clear or not general. It is then in any case possible that the defendant is not guilty in the sense that he was aware of the wrongfulness of his commissions and omissions.

At any rate, from the point of view of continental European thought on penal law, the fact that a person was not aware of doing wrong is a point which the Tribunal must not overlook.

Now the question as to whether the penal law contained in the Charter is ex post facto penal law does not present any difficulties if the stipulations of the Charter are unequivocal and the prescriptions of International Law to date are uncontested.

But what if we have regulations capable of several interpretations before us, or if the rules of International Law are the subject of controversy?

Let us take the first: A stipulation of the Charter

H1263 - 0008

is ambiguous and therefore needs interpreting. According to one interpretation which can be justified, the stipulation appears to be an ex post facto law, according to another, which can be equally well justified, it does not.

Let us take the second: The regulation is clear or has been clarified by the interpretation of the court, but experts on International Law are of different opinions on the legal position to date: It is not certain whether we have not got an ex post facto law before us.

In both cases it is relevant whether the defendant was conscious of the wrongfulness of his behaviour.

I intend to elucidate how important these considerations are in this trial.

I shall now begin the examination.
The starting points of the British and French Chief Prosecutors are fundamentally different.

H1263 – 0009

The British Chief Prosecutor argued as follows, if I understood him correctly:

1) The unrestricted right of states to wage war was partly eliminated by the League of Nations Covenant and later fundamentally by the Briand-Kellogg Pact, which is the core of the world peace order which still continues to be equally valid today. War which it prohibits is a punishable violation of law within and towards the community of nations.

And the individual who has acted in a responsible position is punishable.

2) The indictment of individuals for breach of the peace is, indeed, something new, but not only morally demanded, but also long overdue in the course of legal developments; in fact it is simply the logical consequence of the new legal position. The Charter only appears to create new law.

And if I understood the British Chief Prosecutor correctly, he asserts:

Since the conclusion of the Pact of Paris, there is a clear legal situation, based on the whole world's uniform convictions as to what is right.

H1263-0010

Since 1927 the United States have negotiated, first with France, then with the remaining Great Powers, with the exception of the Soviet Union, and with some of the smaller powers, concerning the conclusion of a treaty intended to abolish war. Secretary of State Kellogg stated with memorable insistence what the government in Washington was striving for, namely:

> The powers should renounce war as an instrument of national policy [1] and this without legal definitions [2] from a practical point of view [3], with purity and simplicity [4], unequivocally and without qualifications [5] or reservations [6]. For otherwise the object desired could not be attained: [7]
>
> <u>To abolish war as an institution, i.e. as an institution of international law.</u> [8]

After the negotiations had been concluded, Aristide Briand, the other of the two statesmen,

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1) Note of Secretary of State Kellogg to the French ambassador 27. Febr. 1928/App. I, Exhibit 1, page 3, passage (2).

2) ibid/ Appendix I, Exhibit 1, p. 3, passage (4)

3) ibid/ Appendix I, Exhibit 1, p. 3, passage (1)

4) ibid/ Appendix I, Exhibit 1, p. 4, passage (5)

5) ibid/ Appendix I, Exhibit 1, p. 3, passage (2)

6) ibid/ Appendix I, Exhibit 1, p. 4 passage (6)

7) ibid/ Appendix I, Exhibit 1, p. 3, passage (4) and p. 4, passage (6)

8) Note of the United States Government to the Governments of Great Britain, Germany, Italy and Japan of 13 April 1928/ Appendix I, Exhibit 2, p. 5, passage (1).

H1263 - 0011

from whose initiative the pact, which in Germany is often called the pact to outlaw war (Kriegsaechtungspakt), springs, declared when it was signed in Paris:(9)

"Formerly deemed a divine right and remaining in international law as a prerogative of sovereignty, such a war has now at last been legally stripped of that which constituted its greatest danger: its legality. Branded henceforth as illegal, it is truly outlawed by agreement....."

According to the conception of both leading statesmen, the Paris Pact meant a change of the world-order at its very r oots ,if only all or almost all the nations of the world, and particularly all the Great Powers, signed the pact or adhered to it later on, as did actually happen.

The change is supposed to be the following:

Up to the time of the Briand-Kellogg Pact, war had been an institution of international law.

Since the Briand-Kellogg Pact war was high treason against the order created by international law.

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9) "Considéróe jadis comme le droit divin et demouróe dans l' éthique internationale comme une prérogative de la souveraineté, une pareille guerre est enfin destituée juridiquement de ce qui constituait son plus grave danger: sa légitimité. Frappée désormais d' illégalite, elle est soumise au régime conventionel d' une véritable mise hors la loi...."
The speech of the French Foreign Minister is printed in: The Department of State, Treaty for the Renunciation of War. United States Government Printing Office. The quotation is to be found on page 309.

H1263-0012

Many politicians and scholars all over the world shared this conception. It is the definite basic conception of the unique commentary on the League of Nations Covenant by which Jean Ray influenced far beyond the borders of France, the practical and theoretical proponents of the idea of preventing war.[10]

It is also the basic conception of the Indictment at Nurnberg.

Diplomacy and the science of international law found their way back into the old tracks after the first World War after a shock from which they recovered remarkably quickly. This to the horror of those who wanted to see the consequences - all the consequences - drawn from the catastrophe.

Mankind had a "grand vision of world peace " then, as Senator Bruce called it when the Pact of Paris was before the Senate for ratification. I know how much the personality and the achievements of Woodrow Wilson are a subject of dispute.

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10) Commentaire du Pacte de la Société des Nations selon la politique et la jurisprudence des organes de la Société. Paris 1930. (See especially p. 73 seq.) Further in the supplements for 1931-1935 : 1er Supplement au Commentaire du Pacte (1931) p. 13 seq; 2e Suppl. (1932) p. 17 seq: 3e Suppl. (1933) p. 18, 39; 4e Suppl. (1935) p. 19,99.

11) Congress. Rec. , Proceed. and Deb. of the 2nd Sess. of the 70th Congr. of the U.S. vol. LXX-Part. 2, p. 1333.

H1263-0013

But the more detachment we achieve, the clearer it becomes that he - by making happy use of his own preparatory[12] work and that of others - finally conceived and presented to the humanity of the time an entirely brilliant train of thought which is as right today as it was then and which can best be condensed as follows:

It is necessary to start afresh. The tragic chain of wars and mere armistices which are called peace must be broken.

For once humanity must have the insight and the will to pass from war to real peace - i.e. to peace which is good in its essence - on existing legal foundations, without regard to victory or defeat; and this peace which is good in its essence must be maintained-and maintained in good condition - by an organised union of States.

Those aims can only be achieved if the most frequent causes of war, namely excessive armaments, secret treaties and the consecration of the status quo as a result of the lack of insight of the current owner - a consecration which is harmful to vital needs - are eliminated.

Humanity did not follow this path. And it is not to be wondered at that amongst those who fought against the instruments of Versailles, St. Germain, Trianon, Neuilly and Sevres, be it in the camp of the vanquished or in that of the victors, were the very ones who strove after real, lasting peace. When the governments

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12) see Baker, Ray Stannard, Woodrow Wilson and World Settlement. New York 1922 passim.

H1263-0014

of the South African Union and Canada, in their replies to Secretary of State Hull's principles of enduring peace of the 16th July 1937, indicated in unusually strong words that an alteration of unjust, imposed treaties was an indispensable precondition for real world peace, they followed one of the fundamental views of the great American president.(13)

Humanity did not follow Wilson.

For the members of the League of Nations, too, war remained a means for settling disputes prohibited only in individual cases, but normal on the whole. So said Jean Ray as late as 1930.(14) The League of Nations did not prove to be a guide to the true order of Peace, indeed it did not even prove to be a sufficient brake on a complete backsliding into the old state. For, in fact, the world slid back entirely.

This is then the all-decisive fact in our problem of law. Before the commencement of the second World War the whole system of collective security, even in the scanty

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13) See KUHN, Arthur K., Observations of Foreign Governments upon Secretary Hull' s Principles of Enduring Peace (A.J. vol. 32 (1938), p. 101-106/ Appendix II, Exhibit 51, p. 146 passages (5), (5a) (6). Also: WILSON, Woodrow, War and Peace. Presidential Messages, Addresses and Public Papers, 1917-1924 (ed by Ray Stannard Baker and William E.Dodd,) New York 1927.

14) Commentaire, page 74.

beginnings it had made, had collapsed (15), and this collapse was acknowledged and declared expressly, or shown by unambiguous actions, by three world powers - and, in fact, declared with full justification:

Great Britain expressly stated this at the beginning of the war to the League of Nations. I shall show this.

The Soviet Union treated the German-Polish conflict simply according to the rules of classic international law concerning debellatio. I shall explain this.

The United States declared their strict neutrality. I shall explain the import of this declaration.

The system of collective security has been much disputed over. In this question of the world's conscience, which is also of fundamental importance in this trial, it cannot be a matter of indifference that this system, rightly or wrongly, appeared in 1938 to such a prominent specialist on International Law as the American, Edwin Borchard, as absolutely inimical to peace and as the child of the hysteria of our age; (16)

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15) Regarding the indisputable fact of the collapse and the responsibility of the Great Powers for this, see the bitter conclusions reached by FENWICK from the period shortly before the second World War (International Law and Lawless Nations. A.J., vol. 33 (1939,) p. 743-745) Appendix II, Exhibit 55, page 157 seq., particularly p. 159, passage (6)

16) Neutrality and Unneutrality (A.J., vol. 32, (1938) p.778, seq/Appendix II, Exhibit 53, p. 151, passages (2) (1), (3)/and p. 154 passage (15)

H1263 - 0016

and the collapse may have had various causes; it is certain that the above-mentioned three world powers testified at the beginning of September 1939 to the collapse - the complete collapse - and that they did not in fact do this as a consequence of the German-Polish war.

1) On the 7 September 1939 the British Foreign Office told the Secretary-General of the League of Nations.:(17)

The British Government had assumed the obligation on the 5 February 1930 to appear before the Permanent International Court of Justice at the Hague whenever an action is brought against Great Britain, i.e. also in the case of actions which other states might bring on account of conduct by which Great Britain had, in the opinion of the plaintiff, violated international law during a war. The British government had accepted this regulation because it had relied on the machinery of collective security created by the League of Nations Covenant and the Pact of Paris functioning: because, if it did function- and as England would of course not conduct any forbidden wars and her opponent would on the contrary be the aggressor -

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17) See Appendix I, Exhibit 33, page 98, including the Memorandum on the Signature by His Majesty's Government in the United Kingdom of the Optional Clause of the Statute of the Permanent Court of International Justice (Cmd.3452. Miscellaneous No. 12 (1929), an extract of which is given here as Exhibit 34 of Appendix I (page 102).

H1263-0017

a collision between England and those states that were faithful to the security machinery could not possibly be caused by the actions of British seapower.[18] However the British government had been disappointed in what it relied on: Ever since the League Assembly of 1938, it had no longer been possible to doubt that the security machinery would not function: on the contrary, it had in fact collapsed completely: a number of members of the League had already declared their strict neutrality before the outbreak of war:

"The entire machinery intended to maintain peace has broken down."[19]

I shall still have to show how right the British government was in the conclusions it drew. It should not be forgotten that the British Premier, Neville Chamberlain, had already proclaimed on the 22 February 1938 in the House of Commons, i.e. before the so called Austrian Anschluss, the complete inefficiency of the system of collective security[20]:

"At the last election it was still possible to hope

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18) Appendix I, Exhibit 33, page 98, passage (1) - page 99, passages (2) and (3) and Exhibit 34, page 102 seq. It is the same train of thought developed by BRIERLY, Some Implications of the Pact of Paris (Br. YB 1929), Appendix II, Exhibit 44, page 126, passages (14), (15).

19) "Tout le mecanisme prevu pour le maintien de la paix s' est disloqué. Appendix I, Exhibit 33, page 99, passages (4) and page 100, passages (3) and (6)

20) Appendix I, Exhibit 29, page 91, passage (3).

H1263 – 0018

that the League might afford collective security. I believed it myself. I do not believe it now. I would say more: If I am right, as I am confident I am, in saying that the League as constituted today is unable to provide collective security for anybody, then I say we must not try to delude ourselves, and, still more, we must not try to delude small weak nations into thinking that they will be protected by the League against aggression and acting accordingly, when we know that nothing of the kind can be expected."

The Geneva League of Nations was " neutralized, " as NOEL BAKER expressed it later in the House of Comm ons. (21)

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21) Appendix I, Exhibit 37, page 111, (21 Nov. 1939).

H1263 - 0019

2) In view of the correct conclusions drawn by the British government in their Note of 7 September 1939 to the League of Nations, it is no wonder if the Soviet Union treated the German-Polish conflict in accordance with the old rules of power politics. In the German-Russian Frontier and Friendship Pact of 28 September 1939 (22) and in the declaration made on the same day (23) in common with the Reich government, the government of Moscow starts from the conception of the debellatio of Poland, i.e. the abolition of Poland's government and armed forces. There is no mention made of the Pact of Paris or the League of Nations Covenant. The Soviet Union notes the abolition of the Polish state machinery by means of war, and draws from this fact the conclusions which seem right to her, agreeing with the Reich government that the new order of things is exclusively a matter for the two powers.

It was therefore only logical when, in the Finnish conflict of the winter of 1939/1940, the Soviet Union took up its stand on classic international law. It disregarded the reactions of the League of Nations, when, without even considering the application of the machinery of sanctions and only appearing to apply an article of the Covenant which was intended quite differently,

22) Appendix I, Exhibit 35, page 108 ,

23) Appendix, I, Exhibit 36, page 110.

H1263-0020

it resolved that the Soviet Union had, as an aggressor, excluded itself from the League (24). The report of the Swiss Federal Council of the 30 January 1940 to the Federal Assembly (25) tries to save the face of the League which has been excluded from political realities.

24) Resolutions of the Assembly and the Council of 14 December 1939/ Appendix I, Exhibit 38, pages 112, 113.

25) Appendix I, Exhibit 39, page 114.

H1263 - 0021

3) The President of the United States stated on 5 September 1939 that there existed a state of war between several states with whom the United States lived in peace and friendship, namely Germany on the one hand and Great Britain, France, Poland, India and two of the British Dominions on the other hand. Everyone in the United States was bound to obey the neutrality regulations most strictly.

From the time of the preliminary negotiations, it was known in the United States that Europe, and particularly Great Britain and France, saw the main value of the pact outlawing war in the fact that the United States would take action in case of a breach of the pact. The British Foreign Minister stated this on 30 August 1928, i.e. four weeks previous to the signing of the pact. During the deliberations of the American Senate on the ratification of the pact, Senator Moses particularly drew attention to this (26). Senator Borah affirmed at the time that it was completely impossible to imagine that the United States would calmly stand by. (27) After the discredited failures of the policy of collective security in the case of

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26) Appendix I, Exhibit 13, page 53, passages (30) and (33). See also Ellery C. Shotwell, Responsibility of the United States in Regard to International Cooperation for the Prevention of Aggression (A.J. vol. 26, 1932, p. 113.)

27) Appendix II, Exhibit 44, p. 127, passage (16). See also Brierly, J.L., Some Implications of the Pact of Paris (Br. YB 1929) He thinks that a violation of neutrality is impossible. (Appendix II, Exhibit 44, p. 127, passage (10) and (12). In 1936 the same thought was expressed by the Englishman Mc.Nair: Collective Security (Br.YB/Appendix II, Exhibit 49, page 143, passage (3).

H1263 - 0022

Manchuria and Abyssinia the world had understood the now famous "quarantine" speech of President Franklin ROOSEVELT of 5 October 1937 and the "Stop Hitler"! warnings of the same President before and after "Munich" as an announcement that the United States would act on the next occasion. The declaration of neutrality of 5 September 1939 could therefore only mean: Like Great Britain and the Soviet Union, the United States accepts as a fact the collapse of the system of collective security.

This declaration of neutrality has often been looked upon as the death blow for the system. The Washington government could reject such a reproach as unjustified. For the system had already been dead for years, in so far as one believes at all that it was ever actually alive. But many did not see the fact that it was not alive at the moment, until the blinding light of the American declaration of neutrality fell upon it.

H1263 - 0023

On the 1 September 1939 a decision had already been reached long before about the various experiments, which had been tried since the first World War to replace the "anarchic world order " of classic International Law by a better, a real, order of peace; i.e. to create in the community of states a general statute according to which there would be wars which are forbidden by law and others which are not forbidden by law. These experiments had, in the opinion of the major powers of the time, collapsed.

The greatest military powers of the earth clashed in a struggle in which they used their full strength. For the proponents of the materialistic conception of history this was a second phase in a process developing according to inexorable laws, in which history ignored diplomatic and juridical formulas with supreme indifference.

For the majority of the international lawyers of the world did state: In the general international law at present valid there is no distinction between forbidden and not forbidden wars.

Hans KELSEN demonstrated this in 1942 in his paper "Law and Peace in International Relations" which he wrote after a careful research into the literature. In this he himself belongs to the minority who concede a legal distinction between justified and unjustified wars. His statement therefore carries all the more weight.

But now we must ask: Are we right in speaking of the collapse of the system of collective securitiy at all? This presupposes that such a system at one time existed.

H1263-0024

Can this really be asserted? This is a question of the greatest importance for this trial, in which the existence of a world wide consciousness of right and wrong is taken as the basis for the indictment for breach of the peace.

There arises before us the tragedy of the Briand-Kellogg Pact, that tragedy from which we all suffered so much, we who rejoiced when the pact was concluded and later, after a first period of depression, greeted the Stimson Doctrine as a long overdue step absolutely essential for the achievement of real peace, and as an encouraging omen of fresh progress.

The United States had a great goal in view in 1927 and 1928, as I have already mentioned. In the League of Nations the problem had been tackled only half-heartedly and with half measures, and this had perhaps done more harm than good to the cause of real peace. The Geneva Protocol had gone on the rocks. Kellogg now wanted to get over all the difficulties which are actually essential parts of the problem, and jerk the world out of its deadlock by taking action without worrying much about theories. The published treaty with its two articles, the renunciation of war and the obligation of peaceful settlement, seemed to fulfil the longings of a humanity which wanted to see at last the act which would liberate it.

But the difficulties which it was desired to get over are partially inherent in the problem,

H1263-0025

and no regulations made by any legislator can ever eliminate them completely. For even if one disposed of unambiguous criterions, who among us fallible human beings would have the authority to give a decision in case of dispute? But we do not even possess unambiguous criterions of aggression and defence.(28) This holds both for the so-called political concept, which is in a way the natural one, and for the legal concept or concepts of aggression and defence.

But these were not the only difficulties pointed out explicitly and implicitly by the French Government in the preliminary negotiations for the pact, and this with the full right of one(29)

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28) See e.g. EAGLETON, Clyde, An Attempt to define Aggression (International Conciliation No. 264,1930), CUTEN, A. La notion de guerre permise. Paris 1931. WRIGHT, Quincy, The Concept of Aggression in International Law (A.J. vol.29, 1935, p. 395, seq.)

29) Note of the United States Government to the Governments of Great Britain, Germany, Italy and Japan of the 13 April 1928; draft treaty of the 20 April 1928 drawn up by the French Government; Note of the British Secretary of State for Foreign Affairs of the 19 May 1928 to the American ambassader; Note of the 23 June 1928 from the US Government to all nine participants in the negotiations; Note of the British Secretary of State for Foreign Affairs of the 18 July 1928; Note of the Soviet Commissar for Foreign Affairs of the 31 August 1928/ App. I Exhibit 2, p. 5, passage (2), Exhibit 3, p.7-9 in toto; Exhibit 5, p. 12, passage (2) and p. 13, passage (3); Exhibit 7, p. 16-18 in toto; Exhibit 8,p.19 in toto; Exhibit 9, p. 20 seq. in toto.

H1263 - 0026

who knows Europe and its very old historical legacy in the way the United States Government knows America and its quite different history. Even if somebody were capable of jumping over his own shadow, the shadow cast by European history is so much longer.

When the world got to know the notes exchanged during the preliminary negotiations, with all the definitions, interpretations, qualifications and reservations, it became manifest to what an extent the opinions of the governments differed from one another despite one and the same wording. One saw the Soviet Governments open - even bitter - criticism of the refusal of the Western Powers to disarm and thus create the essential precondition for an effective policy of peace, further of the vagueness of the treaty (30) but especially of the famous English reservation of a free hand in certain regions of the world, the reservation which has often been called the British Monroe Doctrine or the Chamberlain Doctrine (31), and one knew that in reality there existed only formal agreement behind the signatures and that no two powers understood exactly the same thing by the treaty. Only on one thing did complete agreement exist: War of self defence is permitted as an unalienable right of all states;

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30) Letter of the People's Commissar for Foreign Affairs of the 31 August 1928/ App. I, Exhibit 9, P. 23, passage (7)

31) Ibid p. 25, passage (10).

H1263-0027

without this right, sovereignty does not exist; and every state is alone judge of whether in a given case it is waging a war of self-defence.

No state in this world was ready to accept foreign jurisdiction concerning the question of whether its decisions on ultimate questions of existence were justified or not.

Kellogg had declared to all the nine states participating in the negotiations, in his Note of the 25 June 1928 (32):

" .....The right of self-defence.... is inherent in every sovereign state and is implicit in every treaty. - Every nation .....is alone competent to decide whether circumstances require recourse to war in self-defence."

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32) App. I, Exhibit 7, p. 16, passage (1) Add to this the opinions of the Senators at the debate on the ratification in the US Senate./ App. I, Exhibit 13, p. 46, passage (19), p. 47, pass. (22); p. 52, pass. (29); p. 57, pass. (45) ; and p. 59 pass.(50). See also KELLOGG, F. the War Prevention Policy of the United States (A.J. vol, 22, 1928, p. 261 seq.)

H1263-0028

The friends of peace were cruelly disappointed.
What was the use of such a treaty anyway ?
They were only too right.

Very soon afterwards they heard with even greater grief of the course of the discussions in the American Senate. The ratification was, it is true, passed with 85 votes against one, with few abstentions, but, if behind the signatures of the contracting states there was no material agreement, there was even less behind the result of the vote in the Senate of the leading world power ideologically and as far as the initiative was concerned.

The discussions in the Senate, which remain memorable for all time because of their profound seriousness and loftiness showed - and several Senators expressly said so - that the opinions of the Senators oscillated between two poles which were worlds apart.(33). For some the treaty really meant a turning-point(33); to others it appeared worthless(33), or, at best, a feeble or friendly gesture(33).(34), a popular slogan(35), a sort of international kiss(36); to still others a fertile soil for all the wars of the future(37), a gigantic piece of hypocrisy (38), even the legalisation

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33) Appendix I, Exhibit 13, p.39, passage (1) and p.47, passage (19a)

34) ibid, p.42, passage (9).

35) ibid, p.55, passage (36).

36) ibid, p.41, passage (7).

37) ibid, p.56, passage (39).

38) ibid, p.59, passage (49).

H1263 – 0029

of war [33] or of British world control [4], or the guaranteeing of the unjust status quo of Versailles for France and Great Britain[41]. Some senators criticized the complete vagueness of the stipulations of the treaty[42] even more sharply than the Russian Note. And if one took Kellogg's declaration about the right of self-defence, which, according to the will of the signatory states, was an integral part of the treaty, literally: what kind of war was then forbidden at all ? [43] Sarcastic and ironic words were used.

Nothing was gained by this Paris Pact if everything were to remain as it stood at its conclusion. In the opinion of the great American expert on International Law, Philip Marshall BROWN, the pact unwittingly engendered by its ineptness the horrible monster of "undeclared war". [44]

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39) Appendix I, Exhibit 13, p.53, passages (31,) (33).

40) ibid. p.41, passage (8); p.48, passage (23): p.(50). passage (26); p.(52), passage (28); p.57, passages (41), (43),(44); p.(58), passage (46). In addition, BORCHARD-LAGE, Neutrality for the United States, 1937,/Appendix II, Exhibit 50, p.144.

41) Appendix I, Exhibit 13, p.(44), passage (15) and p.57, passage (42)

42) ibid. p.46, passage (18) and p.54, passage (35).

43) ibid. p.39/40, passages (2), (3), (4), (5).

44) International Lawlessness, A.J. vol.32 (1938) p.775/ Appendix II, exhibit 52, p.148, passages (3), (4).

H1263 – 0030

Those who fought against Versailles, Germans and non-Germans, because progress was blocked, and those who criticized the League of Nations, Germans and non-Germans, because it did more harm than good to the will for progress, had all rejoiced for nothing at the end of August 1928. The decisive step had not been taken.

But above all the one thing that is not sufficient in itself but is indispensable if a guarantee of peace is really to be created, the one thing that - in the unanimous opinion of all who reckon with human beings as they really are - is necessary, was not tackled at all:

To create a procedure by which the community of states can, even against the will of the possessor, change conditions that have become intolerable, in order to provide life with the safety-valve it must have if it is to avoid an explosion.

Just as the state can, if at all, avoid revolutions only by good legislation and by adjusting the laws to the altered manner of life in good time, so it is with the community of states as well. Wilson also had this fundamental principle in mind as we saw. One of the great British experts on international law, one of the enthusiastic, unconditional and progressive adherents of the Paris Pact, McNAIR, took this into account too when, in 1936, he wanted to have placed beside collective force the collective and peaceful revision of conditions which had become.

H1263 - 0031

dangerous(45). This was taken into account by the American experts on International Law, BORCHARD(46) and FENWICK,(47) in their warning explanations of the aspects of the situation connected with international law, shortly before the second World War. The Government of the German Reich had, by the way, pointed out this problem which overshadowed all others, in Stresemann's Note to the American Ambassador dated the 27 April 1928, when unconditionally agreeing to Kellogg's proposal.(48)

The problem of "collective revision" was not seriously tackled later on either. This is not surprising, if only because the very character of such an institution presupposes renunciation of their sovereignty by the states. And can such a renunciation be considered in the times we live in ? Philip BROWN melancholically thinks that this is less possible than ever(49). And for this reason a real forward step in the question as to how war could literally be outlawed was not practicable.

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45) Collective Security (Br.YB,1936, p.150 seq.)
Appendix II, exhibit 49, p.142, passage (2).

46) Neutrality and Unneutrality (A.J.,vol.32,1938, p.778 seq.)
Appendix II, exhibit 53, p.151, seq., particularly p.152, passages (6), (7), (8), (9).

47) International Law and Lawless Nations (A.J.,vol.33 1939, pp.743-745/ Appendix II, exhibit 55, p.159, passages (7) and (8).

48) Appendix I, exhibit 4, p.10. See also SCELLE, George, Theorie juridique de la revision des traites. Paris, 1936; further : KUNZ., Josef, The Problem of Revision in International Law (peaceful change") .A.J.,vol.33 1939, pp.33-35.

49) International Lawlessness (A.J.,vol.32,1938,p.775) / Appendix II, exhibit 52,p.148, passage (1) and (2).

H1263 - 0032

The Government of the United States and the League of Nations did a great deal to satisfy the urgent demands of the nations in spite of these inextricable interdependences. They subsequently tried to give the pact a precise content and "teeth". The science of international law provided suggestions for this and checked it. We must also trace this process briefly even though it remained completely unsuccessful, because the seeds of the ideas contained in the Indictment are to be found here, insofar as its line of argument is not a political or ethical, but a legal one.

Firstly: In its ban on aggression, the Paris Pact unquestionably starts from the political concept of aggression, But in that it is quite indefinite. SHOTWELL and BRIERLY, among others, tried to help immediately by deducing a legal concept of aggression from the second Article of the Treaty, which Article establishes the obligation to follow a procedure of peaceful settlement.(50) We can leave open the question whether this interpretation may be applied to the treaty. In practice nothing is actually gained by doing so; one kind of difficulty is simply put in the place of another. There are no fewer obscurities: The measures of peaceful settlement presuppose good will on both sides; what, then, if it is lacking on the other side? And what is still a measure of peaceful settlement and what is one no longer ? The Russian Government was quite right in the above-mentioned note of 31 August 1928

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50) BRIERLY, Some Implications of the Pact of Paris (Br.YB.1929, p.208 seq.) / Appendix I, exhibit 44, p.123, passage (3).

H1263 – 0033

to the Briand-Kellogg Pact when it expounded this question.(51)

Then: Other attempts to help tried to develop a completely new world constitution from the entirely indefinite pact by means of logic. They are connected with the name of the American Secretary of State Stimson and with the work of the Budapest Meeting of the International Law Association in 1934(52).

To understand this it is necessary to assume that the Kellogg Pact really brought about, in a legally definable manner, an unambiguous and unconditional renunciation of war. Then, of course, there no longer exists the right to wage wars as and when one likes. War waged against this prohibition is an offence against the constitution of the community of states. We are immediately faced by the question:

Can the legal position of a State which attacks contrary to law be the same as that of a State which is attacked contrary to law ?

If one answers: No, as does for instance the influential French commentator of the League of Nations Covenant, Jean Ray,(53) does this then not mean the elimination of the most important fundamental principles of classic International Law ?

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51) Appendix I, exhibit 9, p.24, passage (8).

52) The well-known "Budapest Articles" in Appendix I, exhibit 23, pp.78/79.

53) Commentaire, p.371.

H1263 - 0034

1.) Do the international laws of war - which after all assume the right to wage war freely and the duel-like character of war and, at any rate, the equality before the law of the belligerents - apply for the appreciation of the actions of the belligerent powers against one another ?

2.) Is it possible, or indeed permissible, that neutrality should still exist in such a war ?,

3.) Can the result of the war, if the aggressor is victorious, be recognized by law, especially if it is put into the form of a treaty, or must not the community of States deprive the aggressor of the spoils of his victory by a policy of non-recognition? Should there be, or perhaps even must there be, common coercive action by the states against the aggressor ?

It must be noted: Not even the theory of law has drawn all the conclusions. The practice of the states, after a few tentative beginnings in isolated points, did not finally carry things to a conclusion in a single case.

With regard to the first point:

The validity of the international laws of war during a war, whatever the latter's origin, has not as yet been seriously disputed by any state. Any doubts that arose were cleared up in a way which allowed of no misunderstandings. I draw attention to Resolution.

H1263 – 0035

No 3 of the League of Nations Assembly of the 4 October 1921 and to the report of the Committee of Eleven of the League of Nations for the adaptation of the Covenant to the Pact of Paris,(54 The aggressor state has the same rights and duties in a war as the attacked nation, i.e. those laid down by the traditional international laws of war. The French Chief Prosecutor appears to wish to deviate from this line, but not to wish to draw the full conclusions. But I do not see any tendency to deviate from the present path even in the most recent practice of states.

With regard to the second point:

Attempts have been made to deny the obligations imposed by neutrality, and in fact finally to give the states not involved the right of non-neutrality and even the right to wage war against the aggressor. Some statesmen and scholars have devoted themselves just as passionately to undermining and even to denying the right to neutrality as other statesmen and scholars have spoken in favour of its undiminished

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54) Of the 8 March 1930./ App.I exhibit 17, page 64. See also RUTGERS in the "Recueil des Cours" (Académie de Droit International) vol.38,p.47. Also: "Budapest Articles" 7 (App.I, exhibit 23, page 79). Also: Josef KUNZ, Plus de loi de la guerre? (Revue Générale de Droit International Public, 1934).- COHN, Neo-Neutrality (1939) / App.II, exhibit 54.

H1263 - 0036

continuance[55]. The clearer it became that the whole system of collective security did not function in the particular cases which were of decisive importance, namely in those cases where steps would have had to be taken against a great power, the more the idea of neutrality asserted itself with new strength. The complete discrediting of the League of Nations and of the system of the Briand-Kellogg Pact in the Abyssinian conflict put classic international law back in its old position again here too.

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55) The Peruvian delegate, CORNEJO, in the Committee of the Assembly of the League of Nations in 1929 (Assemblée 1929, C III J.O., p.201): Neutrality no longer exists! Stimson: The Pact of Paris. Address, 8 August 1932 / Appendix I, exhibit 20, page 76, passage (3).

Hull's Declaration on the Neutrality Law of 17 January 1936 / Appendix I, exhibit 27, page 83.

Speech by the Swedish Foreign Minister Sandler of the 6 Dec. 1936/ Appendix I, exhibit 27, page 84 seq.

3 October 1939: Declaration of Panama; the exchange of Notes by the 21 American Republics with Great Britain, France and Germany (23.12.1939; 14.1., 23.1., 14.2.1940) is based completely on the classic Neutrality Law.

The Budapest Articles.

Literature: See in the index of authors and works-Appendix III- The works and papers by:

D'ASTORY, B. (1938), BATY, Th. (1939), BONN, M.J. (1936/37). BORCHARD, E.M. (1936; 1937; 1938; 1941), BRIERLY, J.L. (1929; 1932), BROWN, Ph.M. (1936; 1939), BUELL (1936), COHN (1939), DESCAMPS, de (1930), EAGLETON, Clyde (1937), FENWICK, Charles G. (1934; 1935; 1939), FISCHER WILLIAMS, Sir John (1935; 1936;) GARNER, James Wilford (1936; 1938), HAMBRO, Edvard (1938), HYDE, C.C. (1937; 1941), JESSUP, P.C. (1932; 1935; 1936), LAUTERPACHT (1935, 1940), MANDELSTAM (1934), MILLER, David Hunter (1928), McNAIR (1936), POLITIS, N. (1929; 1935), RAPPARD, W.E. (1935-1937), SCHINDLER, D. (1938), STIMSON, H. (1932), STOWELL, Ellery C. (1932), TENEKIDES, C.C. (1939), WHITTON, J.B. (1927, 1932), WRIGHT, Quincy (1940).

H1263-0037

In 1935 Switzerland declared her unrestricted neutrality(56); Belgium, Denmark, Finland, Luxemburg, Norway, Holland and Sweden followed with their Declaration at Copenhagen on 24 July 1938(57). The failure of the League of Nations was the reason, this fact also being mentioned openly.

With reference to the third point :

The following is the idea of the policy of non-recognition. The states not involved in a conflict should conduct themselves as members of the community of states, i.e. they should protect the constitution of the community of states by refusing to recognize the fruits of the victor's victory, should he have been the aggressor. The situation he has created by force should not even seem to become a legal situation. He will thus be deprived of what he has gained, and one of the main inducements to wage war will thereby be eliminated. Such a policy of non-recognition is undoubtedly not enough to guarantee a system of collective security by itself, but it is an indispensable part of such an order. There can be no dispute about this. The Brazilian representative BRAGA gained merit by proposing, at the 2nd League Assembly in 1921,

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56) Reservations of the Swiss delegation (M.Motta) of 10.10. 1935/Appendix I, exhibit 25, p.81/82, especially the passages (3), (4), (5).

57) Appendix I, exhibit 30, p.93.

H1263 - 0038

such a policy to be followed by the members of the League of Nations under the name of a "universal juridical blockade" (blocus juridique universel)[58]. The Finnish representative PROCOPE interpreted Article 10 of the Covenant in this sense in 1930 before the League Assembly.[59] The Notes of the American Secretary of State STIMSON of 7 January 1932 to CHINA and JAPAN made this idea echo throughout the world.[60] Their contents are commonly called the Stimson Doctrine. The League of Nations accepted the Doctrine as a resolution of the Assembly dated the 11 March 1932.[61] The idea was later the central point of the Pact of Rio de Janeiro of 10 October 1933[62] and of the Budapest Articles of 10 September 1934[63].

The conflict between Italy and Abyssinia in 1935/36 became the great test-case[64], which decided the fate of the system of collective security:

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58) Appendix I, exhibit 10, p.35.

59) Appendix I, exhibit 16, p.63.

60) Appendix I, exhibit 18, p.65.

61) Appendix I, exhibit 19, p.66.

62) Appendix I, exhibit 22, p.76.

63) Appendix I, exhibit 23, p.78.

64) Jean Ray, 4th Supplement to the Commentary, 1935, p.10: "A statesman said one day, speaking of article 16, that if it was applied, it would undoubtedly only be applied once. One can say the same thing about the whole machinery which is intended to be an obstacle against war." See also FISCHER WILLIAMS, Sir John, Sanctions under the Covenant (Br.YB 1936) and McNair, Arnold D., Collective Security (ibid/Appendix II, exhibit 48 and 49, p.134, passage (1) and p.140, passage (1).

H1263 - 0039

The League of Nations declared a member which was a great power to be the aggressor and decreed economic sanctions, but then shrank from coercive military measures and finally, after Italy's victory, struggled painfully in debates on procedure, especially at the 18th Assembly of the League, to find an answer to the question as to how the League, without openly betraying its constitution, could cross the attacked member, the minor-power Abyssinia, off the list of existing states and recognize it as part of the Italian Empire. The United States also did not enforce the Stimson Doctrine, but remained strictly neutral(65),(66).

It is necessary to know all this; and also to know that the British Government on 20 February 1935

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65) With reference to the Stimson Doctrine and the case of Abyssinia, see in the index of authors and works - Appendix III- the works and papers of BORCHARD (1933), FISCHER WILLIAMS(1936), McNAIR (1933), SHARP (1934), STIMSON (1932), WILD (1932), WRIGHT (1932, 1933).

66) With reference to the system of "collective security", see from the literature concerning the whole position in international law (Appendix III): BRIERLY(1932), BOURQUIN (1934), BROUCKERE (1934), CUTEN (1931), DRESCAMP (1930), EAGLETON (1930, 1937, 1938), ELBE (1939), FENWICK (1932,1934, 1935,1939), FISCHER WILLIAMS (1932, 1933, 1935, 1936), GIRAUD (1934), GARNER (1936), GRAHAM (1929, 1934), HILL (1932), HYDE (1941), JESSUP (1935) MANDELSTAM (1934), POLITIS (1929), RITGERS 1931, SHOTWELL(1928), WICKERSHAM (1928/1929), WHITTON (1932,) WRIGHT (1942).

H1263 - 0040

politely but firmly refused, through the Lord Chancellor, Viscount SANKEY(67), to accept the logical deductions, and paid tribute to the old truth: it is not logic but history that creates law.(68) On a later occasion, when Secretary of State Cordell Hull had explained the principles of American policy to all the powers on the 16 July 1937,(69) the Portuguese government isued a warning against "the abstract and generalizing tendency of jurists"; it warned against attempts to"find a single formula" and against not studying historic facts sufficiently(70).

We therefore come to the conclusion that:

In the practice of the relations between states there existed - at least during several years prior to 1939 - no effective general ruling of international law regarding prohibited war.

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67) Parl. Deb., H.L. 5th ser., vol.95, cols.1007, 1043 / Appendix I, exhibit 24, page 80.

68) LAUTERPACHT, The Pact of Paris and the Budapest Articles of Interpretation (Transactions of the Grotius Society, XX, 1935, p.178) draws the conclusion from the fact that States can accept or reject what was logically deduced to be legal in Budapest. Jessup asserts that the States did not accept the Budapest Articles (Neutrality, its History, Economics and Law, Vol:IV, Today and Tomorrow, 1936 / Appendix II, exhibit 47, p.132, passages (1), (2).).

69) See A.J. vol.31, 1937, p.680-693.

70) See the concurring statements by KUHN, Arthur K.: Observations of Foreign Governments upon Secretary Hull's Principles of Enduring Peace (A.J., vol.32, 1938, p.101, 106)./ Appendix III, exhibit 51,p .145, passages (3) and (4) and p.147, passage (8).

H1263 - 0041

No such general ruling existed so far as the leading statesmen and the peoples were aware.

This is, in fact, the ultimate reason why the path of special rulings on international law was followed to an ever increasing extent : two states would then conclude treaties, in full knowledge of their particular historical conditions and with a view to securing peace between themselves.

Now, during the second World War the United States Government decided to help Great Britain. Great Britain was able to acquire destroyers and it later received the assistance of Lend-Lease. The American public recognised this act of assistance as being essentially no longer neutral; it was regretted by some, welcomed by others, now attacked and now defended. The supporters of the measures before the American public, above all Stimson and Cordell Hull, quite rightly did not attempt to justify them as consistent with neutrality. On the contrary, they took up their stand on the Pact of Paris as interpreted by the Budapest Articles(71). As we saw, this would, according to Viscount Sankey's indisputably correct conception of what are the sources of international law, have been wrong even in 1935.

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71) See WRIGHT in A.J., vol.34,1940, p.680 seq.
Particularly Stimson's speech of the 6.1.1941 should be mentioned here. (Appendix I, exhibit 41, p.115/116.)

H1263 - 0042

After the developments which had taken place since Italy's victory over Abyssinia, such discussions were entirely outside the field of legal realities. Their purpose was to resolve internal dissensions in America and they could therefore be of no direct importance for international law. Even had these discussions taken place between states, they could at most have helped to create law. But is it actually necessary to assert or prove that such discussions could not have created, during the great struggle, a law to attain which so many efforts - efforts which proved to be Utopian - were made in vain in peace-time ? In this court many ways of legal thinking meet - ways which are in part very different. This leads to certain insoluble differences of opinion. But no way of legal thinking anywhere on earth, from the most ancient times to the most recent, could or can make possible arguments which contradict the very nature of law as a social order of human life arising out of history. If several governments accept articles, about the contents of which they are of different opinions, and if these articles then find no real application in the practice of these governments - which is not to be wondered at considering the circumstances under which they arose - and if theorists then interpret these articles and the practice of Governments rejects these interpretations either expressly or tacitly, one must then resign oneself to this, in so far as one wants to keep to the task of legal appreciation, no matter how much the goal may be worth striving for politically or morally !

H1263 - 0043

But let us forget for a moment the bitter realities of those years following the Italo-Abyssinian conflict. Let us suppose for a moment that a general and unambiguous pact had existed, accepted and applied by the Contracting Parties in fundamental and factual agreement. Would the liability of individuals to punishment for the breach of such a treaty be laid down in international law ?

NO.

Not even the liability of the State to punishment, let alone that of individuals.

The breach of such a treaty would not differ under the international law at present valid from any other violation of international law. The state which violates a treaty would commit an offence against international law, but not a punishable act(72). Attempts were occasionally made to deduce from the words "délit" (offence), "crime international" (international crime) and "condamnation de la guerre" (condemnation of war) the existence of an International Criminal Law dealing with our case. Such conclusions are based on wrong premises(73). Every lawyer knows that

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72)FISCHER WILLIAMS also stresses this in his "Sanctions under the Covenant" (Br.YB, 1936, p.130 seq./Appendix II, exhibit 48, particularly p.136). Also KELSEN: Collective and Individual Responsibility... (1943), p.531/Appendix II, exhibit 57, page 166, passage (5).

73) FISCHER WILLIAMS gives an only too justifiable warning against false ideas

about the words "international crime" in his "Sanctions under the Covenant" (Br.YB, 1936, p.130 seq./ Appendix II, exhibit 48 p.136, passage (3).

H1263 - 0044

any unlawful behaviour can be called a "délit" (delictum), not only punishable behaviour. And the word "crime" is used even entirely outside the legal sphere. And this is precisely the case here! When, in 1927, on Poland's application, the League of Nations Assembly declared war to be an international crime, the Polish representative expressly stated that the declaration was not actually a legal instrument, but an act of moral and educational importance. (74)

The attempt to organise a universal world system of collective security on a legal basis failed. But this does not mean that the numerous bilateral treaties, whose purpose it is to preclude wars of aggression between the two partners, became inapplicable. One will actually have to examine whether the parties to the treaty may have made the existence or continued existence of a general machinery of collective security the prerequisite for the validity of the treaty.

The same applies to unilateral assurances of non-aggression as to the bilateral treaties.

Many bilateral non-aggression pacts were concluded, and several unilateral assurances were given. In some cases the political and in some a legal concept of aggression, and even a number

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74)
Actes de l'Assemblée, 1927, P., p.153. Also Jean RAY, Commentaire, p.74/75.

H1263 - 0045

of such legal concepts side by side, determine right and wrong. The German Reich also concluded a series of such pacts. They have been drawn upon by the prosecution as an argument. One must examine whether all these treaties were still in force at the critical moment. This examination must be left to the individual defence counsel. But if the German Reich did attack in an individual case in breach of a non-aggression pact which was still valid, it committed an offence in international law and is responsible therefor according to the rules of international law regarding offences in international law.

But only the Reich. Not the individual, even if he were the head of the state.

This is beyond all doubt according to the international law at present valid.

It is unnecessary even to speak about this. For up to the most recent times not even the possibility has been mentioned, either in the Manchurian, or in the Italo-Abyssinian or in the Russo-Finnish conflict, of instituting criminal proceedings against those people who were responsible, on the Japanese, Italian or Russian side, for planning, preparing, launching and prosecuting the war, or who simply participated in these acts in any way. An it was certainly not because matters had, paradoxically enough, not been thought out to the end, that they were not prosecuted. But they were not

H1263 – 0046

prosecuted because this cannot happen as long as the sovereignty of states is the organisational basic principle of the whole inter-state order. One can have one or the other, but not both.(75)

Should things reach the point where, according to general world law, the men who participated in the planning, preparation, launching and prosecution of a war forbidden by international law could be brought before an international criminal court, the decisions regarding the state's ultimate problems of existence would be subject to super-state control. One could of course still call such states sovereign, but they would no longer be sovereign. In his paper of late 1943 which I have already mentioned several times and which he wrote after the Moscow conference of the 1 November 1943, KELSEN again and again repeats the phrase that in positions of breach of the peace, the liability of individuals to punishment does not exist according to the general international law at present valid and can not exist or account of sovereignty. (76)

For Europeans, at any rate, the state has for the last four centuries, above all since the ever more rapid advances made by the idea of the national state, gained the dignity of a superperson.

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75) FISCHER.WILLIAMS, Sanctions under the Covenant (Br.YB, 1936) / App. II, exhibit 48, P.135 passage (2), is right.

76) Collective and Individual Responsibility....., pp.534, 538, 539, 540, 542/ App.II, exhibit 57, p.167, passage (6); p.168, passages (8) and (9); p.169, passages (10, and (11); p.170, passage (13) and p.173, passage (18).

H1263 – 0047

Of course acts of state are acts of men. But they are in fact acts of state, i.e. acts of the state carried out by its organs and not the private acts of Mr. Smith or Mr. Robinson.

What the Indictment is doing when, in the name of the world community as a legal entity, it wants to have individuals legally sentenced for their decisions regarding war and peace, is, when one looks at it from the angle of European history, to look upon the state as one would look upon a private individual, indeed, more than that, what it is doing is to destroy the state mentally. Such a charge, the moral justification of which is not my concern, such a charge is - as we have already shown - incompatible with the very nature of sovereignty and with the feeling of the majority of Europeans. It seems, indeed, as though not only Europeans feel that way. In 1919, in Paris, it was the American delegates at the War Guilt Investigation Committee who opposed most strongly any legal sentence on the Kaiser for the very reason of the incompatibility of such a procedure with the sovereignty of the State.(77) And it is impossible to recognise

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77) Scott, James Brown, emphasises the great services which the American delegates did at that time to law (in House-Seymour: What Really Happened at Paris. - New York 1921 -/ Appendix II, exhibit 43, whole of page 122).
Williams E.T., The conflict between Autocracy and Democracy (A.J., vol.32, 1938, page 663 seq,p.664
Kelsen, Hans, Collective and Individual Responsibility....., p.541/Appendix II, exhibit 57, p,171, passage (15) and p.172, passage (17), See also Borchard, Edwin; Neutrality and Unneutrality (A.J., vol.32, 1938, p.778 seq.)/Appendix II, exhibit 53, p.155, passage (17).

H1263 – 0048

the idea of sovereignty more strongly than Kellogg did eight years later during the negotiations in connection with the Pact of Paris, when he declared: Every state is the sole judge of its behaviour with regard to questions affecting its existence.

There are epochs which idolise the sovereignty of the State, others anathematize it. Some idolise and anathematize it simultaneously. Our epoch does so. Perhaps we are living in a period of transition. Perhaps a transformation of values is taking place. Perhaps world community will become the supreme political treasure for the peoples, in place of their own particular States, which have at any rate held this position hitherto. Perhaps we shall reach a point where the unleashing of a war deserving moral and also legal condemnation will, for the general legal conscience, constitute high treason against the world community. Perhaps we shall reach a point where it will be permissible, or even compulsory, to betray a government which starts such a war to foreign countries without a legal justification for calling this high treason towards one's country. At the moment in no nation is there a majority - let alone unanimity - in support of this opinion.

The punishment of individuals by the legal family of nations for breach of the peace between states can thus be ordered only if the fundamental principles of the international law currently valid and the scale of values which has for centuries been firmly rooted in the feeling of the European nations, are abandoned -

H1263 - 0049

that scale of values according to which the state, one's own sovereign state, forms the indispensable foundation for free personality.

The Indictment mentally wipes out the German state for the time when it stood upright in its full strength and acted through its organs. It must do so if it desires to prosecute individual persons for a breach of the peace between states. It must turn the defendants into private individuals. But it then combines them - so to speak on the private plane - with the help of the criminal law concept of a conspiracy which is taken from Anglo-Saxon law and is strange to us, gives them the many millions strong substructure of organisatio and groups which are designated as criminal, and thereby again places a superperson before us,

In as far as the Charter supports all this by its regulations, it lays down fundamentally new law, if - with the British chief prosecutor - one measures them against existing international law. That which, originating in Europe, has finally spread to the whole world and is called international law, is, in essence, a law of the coordination of sovereign states. If one measures the regulations of the Charter against this law, one must say: The regulations of the Charter negate the basis of this law, they anticipate the law of a world state.

They are revolutionary. Perhaps

H1263-0050

in the hopes and longings of the nations the future is theirs.

The lawyer, and only as such may I speak here, has only to establish that they are new - revolutionarily new. The laws regarding war and peace between states had no place for them - could not have any place for them. Thus they are criminal laws with retroactive force.

B.

Now the French chief prosecutor - if I understand right - recognized the sovereignity of states in his humanly very moving speech and quite rightly saw that an unbridgeable gulf exists between the Charter and the international law at present valid, when it wants to see individuals punished as criminals for breach of international peace. He therefore shifts the trial from the plane of international law to that of constitutional law. It might possibly have happened that a German state power would have settled accounts after the war with those people who were responsible for launching the war. As the whole life of the German people is crippled today, those foreign powers who, in cooperation with each other on the basis of treaties, have territorial power in Germany, are undertaking this settlement of accounts.

H1263 - 0051

The Charter has laid down the rules which are to guide the Court in its investigation and verdict.
One can here leave unexamined whether this opinion is legally right or not.
Even if it is right, our question is not altered thereby: When looking at the problem from this point of view, no less than from that of international law, we must know how far the Charter creates penal law with retroactive force. But we must now measure the regulations of the Charter not only against the international law which was valid for Germany and was transformed into national law - as people are want to say - but also against the national criminal law which was binding on the defendants at the time of the deed. It is, after all, possible for a state, a member of the community of states, to be more cosmopolitan in its criminal law than the current international law. The rule of the Charter which is new with regard to existing international law may correspond to an already existing national law, and then it would not be a criminal law with retroactive force. So how was the breach of peace between states - particularly the breach of non-aggression pacts - treated in the national criminal law to which the defendants were subject at the time of the preparation and launching of the war. ?

It is possible that, in a state, those people are threatened with punishment who have

H1263 - 0052

prepared or launched or waged a war in breach of the international obligations of that state.(78) That would actually be completely unpractical. For the result of a war also decides the internal settling of accounts. No criminal court threatens a victorious government. But, in case of defeat, the defeat itself gives the measures of the settlement of account. In any case the regulations of the Charter regarding punishment for breach of the peace between states are now for the national criminal law which the defendants were subject to at the time of the deed. But if one does not understand the phrase "null um crimen, nulla poena sine lege" as it is understood on the European continent, i.e. as meaning that law in the sense of "lex" is a rule laid down by the state, a state law, but is of the opinion which - as far as I can see - is peculiar to English legal thinkers, that law in the sense of "lex" can also be a deeply rooted rule of ethics, of morality, we have one question left: As things happened to be, did the defendants, - former ministers, military leaders, directors of economy, heads of higher authorities-, feel at the time of the deed, or could they have felt - that a behaviour which is now made punishable by a retroactive law was against their duty?

The answer to this question cannot be given unless one has an insight into the nature of the constitution of the German Reich at the moment of the deed.

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78) KELSEN seems to think that no such state exists, (Collective and Individual Responsibility..., p.543/App.II, exhibit 57, p.173, passage (20).).

H1263 - 0053

The German Reich was incorporated into the community of states in that form, with that constitution, which it happened to have at any given moment. Such is the case with every member of the community of states. The United states and the British E pire, the Union of Soviet Socialist Republics and the French Republic, Brazil and Switzerland stand in the framework of the family of nations with that constitution which they happen to have at the time.

The prosecution has, with full justification, tried to give a picture of this concrete legal structure of the Reich. For, without trying to do this, no one in this trial will be able to arrive at a decision regarding right and wrong. In addition it seems to me that many ethical questions which have been raised here require such an attempt to be made. But I an affraid that, with the picture presented by the prosecution, it is not possible to arrive as close to the truth as is possible in spite of the complex nature of the subject.

The prosecution starts with the conception of a conspiracy to conquer the world on the part of a few dozen criminals. The German State, if one looks upon things in this way, becomes a mere shadow or tool. But this State had long been in existence; no one could set aside the enormous weight of its history. It was only various things in this history, at home and especially abroad, that made Hitler's rise to power at all possible or which made it easier for him, and it was many things in this history that guided, urged on, limited or put a brake on Hitler in his choice of aims and means, and helped to decide the success or failure of his measures and undertakings.

H1263 - 0054

The prosecution was certainly right in laying great stress on the so-called Fuehrer principle. This so-called Fuehrer principle was, in fact, for the eyes and even more for the ears of the German people and of the world in general, the organisational guiding principle in the development of the Reich constitution after 1933.

It was certainly never unambiguous and it considerably changed its character during the course of the years. In the life of men, leading and commanding present inherent contradictions.

There exists one - may I say - soulless, mechanical way of governing mankind, which is to rule by issuing commands. And there is another one, which is to lead the way by setting an example and to be followed voluntarily, which is to lead or whatever one wishes to call it. This differentiation between two fundamentally different methods of governing men is often already made difficult by the words used; in the German languages for instance, this is so because leading is sometimes called unconscious ruling, and ruling is sometimes called leading. Furthermore, the differentiation is rendered more difficult by the fact that it is at one time leading and at another commanding that governs the relations between the same persons or by the fact that methods which are actually applicable to leading are used for ruling, and vice versa. Every State has been, is, and will be faced by the question of how

H1263 - 0055

it is to link up both these methods so that they complement, advance and keep a check on each other. Both methods appear continually and everywhere. There has never yet been a really great ruler who was not also a leader. But minor rulers are also subject to this law. And the Hitler regime brought about - at least to begin with - a synthesis of both methods which had at least the appearance of being tremendously efficient.

To this synthesis has been attributed - perhaps not unjustly - much of what the world saw with wonder, sometimes approvingly but more often disapprovingly, as the result of an unheard of mobilisation, concentration and increase in the energies of a nation.

This particular synthesis of leading and commanding found its strongest expression in the person of Hitler himself, in his actions of leading, for instance in his speeches, and in his commands. Hitler's acts of leading and commanding became the motive power of the German political life of that time. Justice must be done above all to this phenomenon. It is of absolutely decisive importance for judging the enormous mass of facts which has been produced here. With all the caution which is natural to men who think along scientific lines and which imposes on them an almost unconquerable mistrust of any attempt to comprehend and evaluate events which have happened so recently, one can perhaps risk this assertion: In the course of the years, Hitler gave commanding an increasingly favoured place to the detriment of

H1263-0056

acts of leading, and finally brought it so much to the fore that commands and not the act of leading became the all decisive factor. Hitler the man of the people became more and more the dictator. The speeches in which he repeated himself ad nauseam even for his most willing followers and overshouted to the irritation even of members of his entourage who had faith in him, became rarer, but the legislative machine worked faster and faster. A later age will perhaps realise how far the great change in the attitude of the German people to Hitler, which was beginning even before the war, was the cause or effect of this change. While, on the question of something superficial, i.e. the question as to how he wished to be designated, he pressed not to be called "Fuehrer and Reich Chancellor " any longer but only "Fuehrer", the way in which the state was being governed was following exactly the opposite path; leading disappeared more and more and there remained naked domination. The Fuehrer's orders became the central element of the German state edifice.

In the public hierarchy, this development brought with it rather an increase than a decrease in Hitler's power. The great majority of German officials and officers had seem nothing behind the organised leadership but a machinery of domination with a new label and, if possible, of an even more bureaucratic nature, side by side with the inherited state machinery. When Hitler's orders became the Alpha and Omega, they felt themselves, so to speak, back in the old familiar path. The queer and puzzling part had gone.

H1263 - 0057

They were back in their world of subordination. But anyway this development had given the Fuehrer's orders a special aura of sanctity for them too; there was no contradicting the Fuehrer's orders. One could perhaps raise objections but if the Fuehrer stuck to his order, the matter was decided. His orders were something quite different from the orders of any official of the hierarchy under him.

Here we have come to the fundamental question in this trial: What position did Hitler's orders ocupy in the German constitution? Did they belong to the type of orders which were set aside by the Charter of this Court as grounds for the exclusion of punishment ?

It was perhaps harder for a lawyer who grew up in the habits of the so-called constitutional state ("Rechtsstaat") than for other people to witness the slow and then ever more rapid disintegration of the guarantees of liberty provided by the constitutinnal state ; for he never came to feel at home in the new order and always stood half outside it . But, for this very reason, he probably knows more than anyone else about the peculiarities of this new order. An attempt must be made to make it comprehensible. State orders, whether they lay down rules or decide individual cases, can always be measured against the existing written and unwritten law, but also against the rules

H1263 - 0058

of international law, morals and religion. Someone, even if only the conscience of the person giving the orders, always asks: Has the person giving the orders ordered something which he had no right to order ? Or: has he formed and published his order by an inadmissible procedure ? But an unavoidable problem for all domination lies only in this: Should or can it grant the members of its hierarchy, its officials and officers, the right - or even impose on them the duty - to examine at any time any order which demands obedience from them, to determine whether it is lawful, and to decide accordingly whether to obey or refuse ?

No domination which has appeared in history to date has given an affirmative answer to this question. Only certain members of the hierarchy were ever granted this right; and they were not granted it without limits. This was also the case, for instance, under the extremely democratic constitution of the German Reich during the Weimar Republic and is so today under the occupation rule of the four great powers over Germany.

In as far as such a right of examination is not granted to members of the hierarchy, the order has legal force for them.

All constitutional law, that of modern states as well, knows acts of state which must be respected by the authorities even when they are defective. Certain acts of laying down rules, certain decisions on individual cases which have received legal force, are valid even when the person giving the order has exceeded his competence or has made a mistake in form.

H1263 - 0059

If only because the process of going back to a still higher order must finally come to an end, orders must exist under every government that are binding on the members of the hierarchy under all circumstances and are therefore law where the officials are concerned, even if outsiders may see that they are defective as regards content or form, if measured against the previous laws of the state concerned or against rules imposed from outside the state.

For instance, in direct democracies, an order given as the result of a plebiscite of the nation is a fully valid rule or an absolutely binding decree. Rousseau knew how much the "volonté de tous" can be in contradiction to what is right, but he did not fail to appreciate that the orders of this"volonté de tous" are binding.

In indirect democracies the resolutions of a congress, of a national assembly or of a parliament may have the same force.

In the partly direct, partly indirect democracy of the Weimar Constitution of the German Reich, the laws resolved by a majority of the Reichstag large enough to alter the constitution and proclaimed by the president were under all circumstances law for all functionaries, including the independent courts of law, even if the legislator - knowningly or unknowingly - might have violated rules not imposed by the state but by churches or by the community of states. In the latter case the Reich would have been guilty of an international offence. For it would not have seen to it that its legislation was in accordance with international law.

H1263-0060

It would, therefore, have been responsible in accordance with the international regulations regarding reparation for international offences. But until the law concerned had been eliminated in accordance with the rules of German constitutional law, all officials of the hierarchy would have had to obey it.

No functionary would have had the right, let alone the duty, to examine its legal binding force with the aim of obeying or refusing to obey it, depending on the result of this examination. This is not different in any other state in the world. It never was and never can be different. Every single state has had the experience of its ultimate orders, its highest orders, which must be binding on the hierarchy if the authority of the state is to exist at all, being on occasion in conflict with rules not imposed by the state-to divine law, to natural law and to the laws of reaso Good governments take trouble to avoid such conflicts. To the great sorrow - indeed to the despair - of many Germans, Hitler frequently brought about such conflicts - and serious conflicts too. And, if only for this reason, his way of governing was not a good one, even though it was for some years successful in some spheres. Only it must here be asserted straight away: These conflicts never affected the entire nation or the entire hierarchy - at least not immediately - but always merely groups of the nation or individual offices of the hierarchy; and it was only some of the people concerned who were fundamentally affected, many being only superficially involved; not to mention those conflicts

H1263-0061

that remained unknown to the overwhelming majority of the people and of the hierarchy, nor, therefore, those orders by which Hitler not only showed himself to be inhuman in individual cases, but simply outside the pale of what is human. It is a purely academic question; Would Hitler's power have taken such deep root, or would it have maintained itself if these inhumanities had become known to larger sections of the people and of the hierarchy ? They just did not.?

Now in a state in which the entire power to make final decisions is concentrated in the hands of a single individual, the orders of this one man are absolutely binding on the members of the hierarchy. This individual is their sovereign, their legibus solutus, as was first formulated- as far as I can see-by French political science with as much logic as eloquence. After all, the world is not faced by such a phenomenon for the first time. In former times it may even have seemed to be normal. In the modern world, a world of constitutions based on the separation of powers ... under the supervision of the people, absolute monocracy does not seem to be right in principle. And even if this is not yet the case today, one day the world will know that the vast majority of thinking Germans did not think any differently on this matter from the majority of thinking people of other nations of Europe and outside it.

Such absolutely monocratic constitutions can nevertheless come about as the result of events which no individual can grasp in their entirety and even less control at will.

H1263 - 0062

This is what happened in Germany from the beginning of 1933 onwards. This is what happened gradually, stage by stage to the parliamentary Weimar Republic, which under Hindenburg was changed into a presidential republic, in a process which partly furthered the development by acts of state which stressed legal forms and which can be read in state documents, but partly simply formed the rules by accepted custom. The Reich law of the 24 March 1933, by which the institution of Reich government laws was created and thus the separation of powers in the sense in which it had been customary was, in practice, eliminated, was, according to the transcript of the Reichstag session, brought about with a majority sufficient for altering the constitution. Doubts about the legality of the law have nevertheless been raised on the grounds that a section of the elected deputies had been kept away from the session by the police and another section of the deputies <u>who were present</u> had been intimidated so that only an apparent majority sufficient for altering the constitution had passed the law. It has even been said that no Reichstag, not even if everybody had been present and <u>all of them</u> had voted, could have abolished the fundamental constitutional principle of the separation of powers, as no constitution could legalise its own suicide. We need not go into this: the institution of <u>government</u> laws became so firmly rooted as a result of undisputed practice that only a formal jurisprudence that is entirely cut off from realities could attempt to play articles of law off against the realities of life and to ignore the constitutional change which had taken place. And for the same reason one's arguments are misguided if one ignores

H1263 - 0063

how the institution of government laws, i.e. of cabinet laws, was later changed by custom into one of several forms in which the Fuehrer legislated. At the base of every state order, as of any order whatsoever, there lie habit and custom. From the time when Hitler became head of the state, practice quickly led to Hitler standing both before the hierarchy and before the whole people as the undisputed and undisputable possessor of all competence. The result of the development was at any rate that

> Hitler became the supreme legislator as well as the supreme author of individual orders.

It was not least of all under the impression of the surprising successes, or what were considered successes in Germany and abroad, above all during the course of this war, that he became this. Perhaps the German people is - even though with great differences between North and South, West and East - particularly easily subjected to actual power, particularly easily led by orders, particularly used to the idea of a superior. Thus the whole process may have been made easier. Finally the only thing that was not quite clear was Hitler's relationship to the judiciary. For, even in Hitler-Germany, it was not possible to kill the idea that it was essential to allow justice to be exercised by independent courts, at least in matters which concern the wide masses in their everyday life. Up to the highest group of party officials - this has been shown by some of the speeches by the then Reich Justice Leader,

H1263-0064

the defendant Dr. Frank, presented here - there was resistance, which was actually not very successful, when justice in civil and ordinary criminal cases was also to be forced into the "sic volo sic jubeo" of the one man. But: apart from the judiciary, which was actually also tottering, absolute monocracy was complete. The Reichstag's pompous declaration about Hitler's legal position, dated the 26 April 1942 (79) was actually only the statement of what had become practice long before.

The Fuehrer's orders were law already a considerable time before this second World War.

In this state order of his, the German Reich was treated as a partner by the other states, and this in the whole field of politics. In this connection I do not wish to stress the way (so impressive to the German people and so fatal to all oppostion) in which this took place in 1936 at the Olympic Games, a show which Hitler could not order the delegations of foreign nations to attend, as he ordered Germans to the Nurnberg party rally in the case of his state shows. I should like rather only to point out that the governments of the greatest nations in the world considered the word of this "almighty" man the final decision, incontestably valid for every German,

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(79) Cf. Text in App. I under C (Exhibit 42).

H1263 - 0065

and based their decisions on major questions on the fact that Hitler's order was incontestably valid. To mention only the most striking cases, this fact was relied upon when the British Prime Minister, Neville Chamberlain, after the Munich conference, displayed the famous peace paper when he landed at Croydon. This fact was adhered to when people went to war against the Reich as the barbarous despotism of this one man.

No political system has yet pleased all people who live under it or who feel its effects abroad. The German political system in the Hitler era displeased a particularly large and ever increasing number of people at home and abroad. But that does not in any way alter the fact that it existed, not lastly because of the recognition from abroad and, because of its effectiveness, which caused a British Prime Minister to make the now world-famous statement at a critical period, that democracies need two years longer than the totalitarian governments to attain a certain goal. Only one who has lived as if expelled from amongst his own people, amidst blindly believing masses who idolized this man as infallible, knows how firmly Hitler's power was anchored in the anonymous and innumerable following who believed him capable only of doing what was good and right. They did not know him personally, he was for them what propaganda made of him, but this he was so uncompromisingly that everybody who saw him from close to and saw otherwise, know clearly that resistance was absolutely useless

H1263 - 0066

and, in the eyes of other people, was not even martyrdom.

Would it therefore not be a self-contradictory proceeding if both the following assertions were to be realized at the same time in the rules of this trial ? :

1.) The Reich was the despotism of this one man, and for this very reason a danger to the world.

2.) Every functionary had the right - in fact the duty - to examine the orders of this man and to obey or not obey them according to the result of this examination.

The functionaries had neither the right nor the duty to examine the orders of the monocrat to determine their legality. For them these orders could not be illegal at all, with one exception which will be discussed later- an exception which, if carefully examined, is seen to be only an apparent one - namely with the exception of those cases in which the monocrat placed himself- according to the indisputable values of our times - outside every human order, and in which a real question of right or wrong was not put at all and thus a real examination was not demanded.

Hitler's will was the ultimate authority for their considerations on what to do and what not to do.

The Fuehrer's order cut off every discussion.

Therefore : A person who, as a functionary of the hierarchy

H1263 - 0067

refers to an order of the Fuehrer's, is not trying to provide a ground for being exempted from punishment for an illegal action, but he denies the assertion that his conduct is illegal; for the order which he complied with was legally unassailable.

Only a person who has understood this can have a conception of the difficult inner struggles which so many German officials had to fight out in these years in face of many a decree or resolution of Hitler's. For them such cases were not a question of a conflict between right and wrong: disputes about legality sank into insignificance. For them the problem was one of legitimacy: as time went on, human and divine law opposed each other ever more strongly and more frequently.

Therefore: Whatever the Charter understands by the orders which it sets aside as a ground for exemption from punishment, can the Fuehrer's order be meant by this? Cane it come within the meaning of this rule? Must one not accept this order for what it was according to the interior German constitution as it had developed, a constitution which had been explicitly or implicitly recognized by the community of states ? Many Germans

H1263 - 0068

did not like Hitler's position of power from the very beginning, and to many Germans who welcomed it at first because they yearned for clear and quick decisions, it later became a horror. But that does not in any way alter the following fact: must not those people who did their duty in this hierarchy, willingly or unwillingly, in accordance with this constitution, feel that an injustice was being done to them if they were sentenced because of a deed or an omission which was ordered by the Fuehrer ?

A community of states could refuse to accept or tolerate as members such states as have a despotic constitution. But up to now this has not been the case. If it is to be different in the future, the non-despotic powers must take the necessary steps to prevent any member of the family of states turning into a despotic power and to prevent any despotic power entering the family circle from outside. Today people are realising more and more clearly that this is the crux of our question. The circumstances must be very special if a modern people lets itself be governed despotically, even if it is as well disciplined as the German people. But as soon as such circumstances do exist, there are no internal counter-measures left. Then only the outside world can help. But if, instead of this, the outside world recognizes this constitution, it is impossible to see where successful internal resistance can come from. In pointing to these special circumstances and to the recognition by the outside world, we draw attention to facts, for the existence of which no German was, in our case, responsible,

H1263-0069

but which cannot be ignored when one asks how all this was possible.

But certain further facts must also be drawn attention to, without a knowledge of which one cannot fully grasp the fact that Hitler's absolute monocracy was able to get such a terribly firm hold. Hitler combined in his person all the powers of issuing legislative and administrative orders on the highest level, orders which could not be questioned and were absolutely valid; but immediately below him the power of the state was divided up into a vast mass of spheres of competence. But the dividing lines between these spheres were not always sharply drawn. In the modern state, particularly in the major states of a technical era, this cannot be avoided. But the tendency to exaggerate questions of competence is certainly no less marked in Germany than in any other country. This facilitated the erection of dividing lines between the departments. Every department watched jealously to see that not other one trespassed into its field. It everywhere suspected tendencies of other departments to expand; considering the great mass of tasks which the so-called "totalitarian" state had heaped upon itself, cases where two or three departments were competent for the same matter could not be avoided. Conflicts between departments were inevitable. If a conspiracy existed, as the Indictment assumes, the conspirators were remarkably incompetent organizers. Instead of co-operating and going through thick and thin together, they fought each other. Instead of a conspiracy we rather have a dispiracy.

H1263-0070

The history of the jealousy and mistrust between the powerful persons under Hitler has still to be written. And let us now remember that in the relations between all departments, and within each department, people surrounded themselves with ever increasing secrecy; between departments and, within the departments, between ranks and within the various ranks, more and more matters were classed as "secret". Never before has there been so much "public life", i.e. non-private life, in Germany as under Hitler; but also never before was public life so screened from the people, above all from the individual members of the hierarchy themselves, as under Hitler .

The one supreme will became, quite simply, technically indispensable.

It became the mechanical connecting link for the whole. A functionary who met with objections or even resistance to one of his orders from other functionaries only needed to refer to an order of the Fuehrer's to get his way. For this reason many, very many, among those Germans who felt Hitler's regime to be intolerable, who indeed hated him like the devil, looked ahead only with the greatest anxiety to the time when this man would disappear from the scene : for what would happen when this connecting link disappeared ? It was a vicious circle.

I repeat: An order of the Fuehrer's was binding- and indeed legally binding - on the person to whom it was given, even if the directive was contrary to international law or to other traditional values.

H1263 - 0071

But was there really no dividing line ? During the first period at any rate - i.e. just at the time when the foundations of power were being laid, at the time when the monocratic constitution was being developed step by step- Hitler!s followers amongst the people saw in their Fuehrer a man close to the people, a selfless, almost superhumanly intuitive and clear thinking pilot, believed only the best of him and only had one worry : whether he was also choosing the right men as his assistants and whether he was always aware of what they were doing. The tremendous power, the unlimited authority, were given to this Hitler. As in every state it also included harsh orders.

But it was never intended as authority to be inhuman. Here lies the dividing line. But this line has at no time and nowhere been quite clearly drawn. Today the German people are completely disrupted in their opinions, feelings and intentions; but they are probably in agreement on one thing, with very few exceptions: they would not wish to draw this line with less severity as accusers than other peoples do towards their leaders. Beyond that line, Hitler's order constituted no legal justification.

But it must not be forgotten that this line is not only vague by nature, but follows a different course in peace to what it does in war time, when so many values are changed, and when men of all nations, especially in our days, take pride in deeds which would horrify them at any other time. And the decision to wage war does not in itself overstep that line, in spite of its tremendous consequences. Not in any nation in the world.

H1263 - 0072

Hitler himself, at any rate, did not recognise this dividing line of inhumanity, of non-humanity, as a limit of obedience in his relations with his subordinates, and here also opposition would have been considered a crime punishable by death in the eyes and for the decisions of this man with limitless power who controlled an irresistible machine. What should a man who received an order overstepping this line, have done ? A terrible situation ! The reply of Greek tragedy, the reply of Antigone in such a conflict, cannot be imposed. It would be Utopian to expect it, or even demand it, as a mass phenomenom.

Before we come to the special question of who in the Reich possessed the power of deciding about war and peace, a further word remains to be said about the forms which Hitler's orders assumed.

Hitler's orders are solely the decisions of this one man, whether they were given orally or in writing, and in the latter case, whether they were clothed in more or less ceremony.

There are some orders by Hitler which can be recognized as such immediately. They are called "Erlass" (Decree) like the Decree concerning the setting up of the Protectorate of Bohemia and Moravia of 16 March 1939, or "Verordnung" (order), like the order for the execution of the Four-Year Plan of 19 October 1936, or "Weisung" (Directive), like the strategic decisions, so often cited during this trial,

H1263-0073

or simply "Beschluss" (Decision) or "Anordnung"(Instruction often they are signed in Hitler's name only; sometimes we find the signatures of one or more of the high or highest civil or military functionaries as well. But it would be fundamentally wrong to assume that this was a case of counter-signatures as they are understood in the modern democratic constitutional law of nations ruled constitutionally or by a parliament - of a counter-signature which makes the signatory responsible to a parliament or to a State Court of Law. Hitler's orders were his own orders and only his own orders. He was much too fanatical a champion of the one-doctrine, i.e. of the principle that every decision must be made by one-and only one- man, to consider anything else even possible, above all things in the case of his own decisions. We will leave his high opinion of himself entirely aside in this connection. Whatever the more or less decorative significance of such counter-signing may have been, there was never any doubt that the Fuehrer's orders represented only his own decision and no one else's.

Special attention must here be drawn to those laws which appeared as Reich Cabinet laws or Reichstag laws.

Hitler's signing of a law of the Reich Cabinet represented the formal certification of a Cabinet decision. In actual fact, however, a stage was reached where the Reich Cabinet laws were also solely decisions by Hitler who had previously given some of his ministers the opportunity to state the opinion of their departments.

H1263 - 0074

And when Hitler signed a law which, according to its preamble, had been decreed by the Reichstag, this was again only a case of a formal certification. In reality, however, it was a decision by Hitler. From November 1933 onwards at the latest, the German Reichstag was not a parliament but an assembly for the acclamation of Hitler's declarations or decisions. These scenes of legislation appeared to many people at home and abroad almost to be an attempt to make democratic forms of legislation ridiculous by caricaturing them; nobody - either at home or abroad - regarded them as proceedings during which an assembly of several hundred men arrived at a decision after consideration, speeches and counter-speeches.

There are, however, also orders by Hitler which are not signed by him, but which can immediately be recognised as his orders. They are drawn up by a Reich Minister or some other high functionary, who states in the introduction "The Fuehrer has ordered" The Fuehrer has decreed". We have before us not an order by the signatory, but a report by the signatory on an order given orally by Hitler. The orders by Hitler as Supreme Commander-in-Chief of the Armed Forces were thus often clothed in the form of such a report.

Finally, there are orders by Hitler which can only be recognised as such by a member of the public if he possesses knowledge of the constitutional position. When the Supreme Command of the Armed Forces (the OKW) issues an order, it is always an order by Hitler. Hitler himself, together with his working staff, was the OKW. The power to issue OKW orde rested solely with Hitler.

H1263 - 0075

By my explanations regarding the constitution of the Hitler-Reich, I have already - so to speak by implication- dealt with the question as to who was responsible for the ultimate decisions - for this state's decisions regarding questions of existence, especially for the decision about war and peace.....

KELSEN said - in his great treatise of the year 1943, which I have already mentioned above (80),-"probably the Fuehrer alone". We must say: Quite definitely alone.

Under the Weimar Constitution, the sole body responsible was the Reich legislature. For Article 45 demands a Reich law for a declaration of war and for the conclusion of peace. And a Reich law could be passed only by the Reichstag or by a vote of the German people. Neither the Reich President, i.e. the Head of the State, nor the Reich Cabinet had the power. They might, at most, have created such circumstances by acts lying within their jurisdiction - possibly the Reich President as Commander-in-Chief of the Armed Forces - as to give the Reich legislature no option in its decision; a problem which, as is well-known, has become a real one in the United States with regard to the relationship of the President to Congress and has, therefore, been seriously discussed, while it was not a real one for the Germany of the Weimar Constitution. If, however, the Reich legislature had, by means of a law, taken the decision to wage war, the Reich President and the whole State hierarchy particularly the

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(80) KELSEN, Collective and Individual Responsibility, p.54(Appendix III, exhibit 57, passages (24) and (25).

H1263 - 0076

Armed Forces, would have been bound by this decision with no right of examination, let alone of objection, even if all the experts on international law in the world had regarded the law as contrary to international law. The Weimar Democracy could have tolerated as little as any other nation a state of affairs in which military leaders as such could examine the decision to wage war taken by the political leaders, in the sense that they could refuse obedience if they thought fit. The military means of power must be at the disposal of the political leaders of a state. Otherwise they are not means of power at all. This has always been so. And it will have to be so all the more if the duty to give assistance against aggression is really to apply amongst the nations.

I have already shown how, in the course of a step by step transformation which laid particular emphasis on legal forms, Hitler replaced all the highest authorities of the Weimar period, and combined all the highest competences in his own person. His orders were law.

The circumstances in a state may be such that the man who is <u>legally</u> solely competent for the decision about war and peace, has, <u>in practice</u>, no - or not the <u>sole - authority</u>. If, however, both the <u>sole legal competence and the sole authority in actual practice</u> have ever been coincidental in any state, such was the case in Hitler Germany. And if, in any question, Hitler ever even accepted the advice of a third party such was <u>not</u> the case in the question of war or peace. He was the arbiter of war and peace between the Reich and other nations.

He alone.

H1263 - 0077

In conclusion:

Sentences against individuals for breach of the peace between States would be something completely new legally- something revolutionarily new. It makes no difference whether we view the matter from the point of view of the British or the French Chief Prosecutors.

Sentences against individuals for breach of the peace between states presuppose other laws than those in force when the actions laid before this Tribunal took place.

The LEGAL Q U E S T I O N O F G U I L T , - and I am here only concerned with that - I S T H U S P O S E D I N I T S F U L L C O M P L E X I T Y . For not one of the defendants could have held even one of the two views of the legal world constitution on which the Chief Prosecutors base their arguments.